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Takings and Progressive Rate Taxation

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TAKINGS AND PROGRESSIVE RATE TAXATION

CALVIN R. MASSEY*

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A decade ago, Professor Richard Epstein argued that progressive rate income and estate taxation is an uncompensated regulatory taking.¹ Nobody paid very much attention. That is a pity, because the question has never been definitively answered by the United States Supreme Court. This Article is an attempt to answer that question, and do so in a reasonably objective fashion.²

In his book, *Takings*, Epstein presents a theoretical challenge to the constitutional legitimacy of the welfare state. The book was largely dismissed by academics, primarily because it stated a

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1. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 295-305 (1985).

2. Everybody has opinions on this subject, as we all pay taxes. The issue of progressive versus proportionate ("flat") taxation is highly politicized. I personally prefer proportionate taxation on policy grounds. See ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* (2d ed. 1995); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 430-444 (1952), reprinted as UNIVERSITY OF CHICAGO LAW SCHOOL REPRINT AND PAMPHLET SERIES NO. 11. But I have an open mind on the quite separate issue of whether progressive rate taxation is constitutionally forbidden.

conclusion that was unpalatable to the orthodoxy of the political left that dominates academia.³ "For most reviewers, [Epstein's] conclusions are so antithetical to conventional wisdom that they discredit the entire book."⁴ Although Epstein's theory is not beyond cavil, it does deserve a fair look through the lens of conventional current takings doctrine.⁵

Before the theoretical rubber hits the doctrinal road, I will briefly recite the essence of Epstein's theory insofar as it applies to progressive rate taxation. Then, in order to demonstrate what issues are doctrinally open, I will present the views expressed by the Supreme Court in prior constitutional challenges to the validity of progressive rate taxation. Following that exercise, I will trace the none-too-clear boundary between taxation and taking. Finally, I will apply current regulatory takings doctrine to the contention that progressive rate taxation is an uncompensated regulatory taking.

A primer on nomenclature is in order. The term "progressive rate taxation" refers to marginal rates (not the effective rates) of taxation that increase with income. Marginal rates are the actual tax rates applied to taxable income. Effective rates represent the portion of a taxpayer's total income that must be paid to extinguish a tax liability.⁶ The term "single rate" or "uniform

3. See, e.g., Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986); Joseph L. Sax, Book Review, 53 U. CHI. L. REV. 279 (1986) (reviewing EPSTEIN, *supra* note 1); Thomas Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986).

4. Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1562 (1986) (citing reviews of Epstein's book).

5. When academics write about constitutional law, they are apt to deal with it as theory. I am as guilty as anyone on that charge. However, my objective in this Article is to apply *doctrine* to test how far "outside of the mainstream" Epstein really is. You will notice that the courts do not rely very much on law review commentary anymore. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); cf. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1129-30 (1996). In that case, the Supreme Court rejected the currently favored academic theory of the Eleventh Amendment with the acid-tongued comment that

[t]he dissent . . . disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. . . . Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication.

Id. The "undocumented and highly speculative extralegal explanation of . . . *Hans*" relied on by the dissent is, of course, the standard fare of most academic commentary on *Hans v. Louisiana*, 134 U.S. 1 (1890).

6. For example, suppose a taxation system exempts the first \$5,000 of income from tax, taxes the next \$10,000 of income at 10%, the next \$10,000 at 20%, and all income above \$25,000 at 30%. A taxpayer with a \$50,000 total income would pay \$10,500 in taxes, consisting of a \$1,000 tax (at 10%) on the income from \$5,000 to \$15,000, a

rate" taxation refers to "proportional" or "proportionate rate" taxation. Under proportional taxation, all taxpayers pay the same proportion (for example, twenty percent) of their taxable income in taxes. If any income is uniformly exempted from taxation, proportional taxation will produce progressive *effective rates* of taxation.⁷ A true "flat tax" is a tax that does not vary with income—as, for example, an annual tax of \$2,000 regardless of income.⁸ This sort of "flat tax," which no one advocates, is quite regressive in its effective rates.⁹ Finally, "regressive rate" taxation consists of marginal tax rates that decrease with income. Regressive rate taxation will produce even more regressive rates of effective taxation.¹⁰ No one seriously advocates regressive rate taxation. Therefore the essential choice, as a policy matter, is between progressive rate taxation and proportional, or single-rate, taxation. The question I explore here is whether the Takings Clause forecloses the choice of progressive rate taxation.

To spare those who read only introductions and conclusions from flipping to the back, I will summarize my conclusions here.

\$2,000 tax (at 20%) on the income from \$15,000 to \$25,000, and a \$7,500 tax (at 30%) on the income over \$25,000. The taxpayer would pay an effective rate of tax of 21% on the \$50,000 total income. By contrast, a taxpayer with a \$10,000 total income would pay a total tax of \$500, consisting of \$500 (at 10%) on the income from \$5,000 to \$10,000. This taxpayer's effective rate would be 5% of the \$10,000 income.

7. For example, assume a 20% single rate with an exemption for the first \$25,000 of income. A taxpayer with \$200,000 in total income would pay \$35,000 in taxes and have an effective rate of 17.5%. A taxpayer with a total income of \$30,000 would pay \$1,000 in taxes and have an effective rate of 3.33%. Of course, in this example, no matter how high the taxpayer's income, the effective rate of taxation would never quite reach the single rate of 20%.

8. This differs considerably from the "flat tax" plans typically offered by those seeking to reform the tax system. For example, Steve Forbes's flat tax plan is in fact a proportional tax that would tax income at a single 17% rate. In addition, the Forbes plan provides for an up-front deduction from taxable income. The deduction feature gives his overall tax plan a progressive effect. See Allan Sloan, *Forbes Speaks From a Flat Tax Bible, With a Little Political Number-Fudging*, WASH. POST, Jan. 23, 1996, at C3.

9. For example, a taxpayer with \$10,000 total income would pay an effective rate of 20% to extinguish a \$2,000 tax liability, while a taxpayer with a total income of \$100,000 would pay an effective rate of 2%.

10. Consider a taxation system that exempts the first \$5,000 of income from tax, taxes the next \$10,000 of income at 30%, the next \$10,000 at 20%, and all income above \$25,000 at 10%. A taxpayer with a \$100,000 total income would pay \$12,500 in taxes, consisting of a \$3,000 tax (at 30%) on the income from \$5,000 to \$15,000, a \$2,000 tax (at 20%) on the income from \$15,000 to \$25,000, and a \$7,500 tax (at 10%) on the income over \$25,000. The taxpayer's effective rate would be 12.5% of the \$100,000 total income. By contrast, a taxpayer with a \$10,000 total income would pay a total tax of \$1,500, consisting of \$1,500 (at 30%) on the income from \$5,000 to \$10,000. This taxpayer's effective rate would be 15% of the \$10,000 income.

The Supreme Court has never decided whether progressive taxation is an uncompensated taking. Taxation is not immune from the strictures of the Takings Clause. Supreme Court dicta suggests that taxation is generally regarded as a fully compensated taking. Although generally true, that idea breaks down when applied to progressive taxation, which seizes a disproportionate share of taxpayer incomes. The Takings Clause requires that public burdens be shared by the entire polity rather than borne by a select few. Progressive taxation burdens the few for the benefit of the many.

The standard of review the Court employs for regulatory takings is much stricter than the standard the Court employs when deciding challenges to economic regulations under due process or equal protection. Standard regulatory takings doctrine reveals that the constitutional case for progressive taxation is weak. The disproportional share of income taken by progressive rates constitutes a permanent dispossession of intangible property. If the Court were to accept conceptual severance as applicable to taxable income, the portion of income taken by progressive taxation would be considered an uncompensated taking, either because it is a permanent dispossession or because it deprives the taxpayer of all economically viable use of that severed strand of property. Even if the Court's ad hoc balancing test applies, there is some doubt that the benefits of progressive taxation outweigh the private costs imposed. In any case, States that impose progressive income taxes may reach independent and differing conclusions on these issues by interpreting their state constitutional provisions concerning takings of private property for public use.

Analysis of this issue reveals that, within legal academia, there is an uncritical acceptance of the premise that taxation is immune from control by the Takings Clause. That premise is faulty. And once the premise is exploded, it is clear that important, legitimate issues are presented. It does not speak well of law that these issues have been airily dismissed for over eight decades as not even worth raising.

I. EPSTEIN'S THEORY

Epstein argues that the Constitution was an embodiment of Lockean political theory. The Lockean social contract, according to Epstein, requires "individuals [to] give up . . . their

right to use force; what they are given in exchange is a superior form of public protection. There is no contract as such, only a network of forced exchanges designed to leave everyone better off than before."¹¹ In this happy land of better-than-Pareto optimality,¹² the Lockean social contract has increased the size of the pie but left individuals with the same proportional slice as before the formation of a political society. Or, to use the overworked metaphor of the twentieth century, the rising tide of political union has lifted everyone's boat.

But what rules follow after the formation of the Lockean compact? Building on Locke's contention that the sovereign merely succeeded to the private rights ceded by the contracting individual members of society, Epstein asserts that "[t]he state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects."¹³ In other words, the Lockean sovereign may never exercise power that could not have been exercised by private citizens. Louis XIV was correct in claiming "*l'état c'est moi*" only because he was a classically Hobbesian sovereign. The Lockean sovereign may only claim that "*l'état c'est vous*."

This difference is critical when it comes to deciding whether the sovereign has "taken" a citizen's property. The absolute monarch, like the 800-pound gorilla, can do what he wants. The Lockean government, however, has committed an impermissible taking when its action would be a wrongful taking if performed by a private party.

In the Epsteinian universe, property consists of the familiar bundle of rights: use, possession, and disposition.¹⁴ Whenever governments infringe any of these rights in a manner that would be actionable between private parties, a taking has occurred. This means that zoning laws (which restrict use), rules barring the ouster of unwanted speakers from shopping malls (which infringe on exclusive possession), and bankruptcy laws (which

11. EPSTEIN, *supra* note 1, at 15.

12. Pareto *optimality* exists when it is impossible to make an exchange without making someone worse off. See BRUCE A. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* at xii (1975). Pareto *superiority* exists when an exchange will make at least one person better off without worsening anyone's position. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (1992).

13. EPSTEIN, *supra* note 1, at 12.

14. See *id.* at 58-59.

force the disposition of contract rights) are all takings.¹⁵

Moreover, Epstein applies the same analysis whether the government action is directed against a single person or against a large segment of the population. To Epstein, a taking has occurred whenever

[the property of] a large number of individuals . . . has been taken by acts which, if done against one of them alone, would be covered by the eminent domain clause

....

.... What stamps a government action as a taking simpliciter is what it does to the property rights of each individual who is subject to its actions The principles that determine whether one person's property has been taken, in whole or in part, also determine whether many people's property has been taken in whole or in part.¹⁶

To be sure, some commentators belittle this as mere formal analysis.¹⁷ However, their explanations of why Epstein is wrong rest mostly on perceived inconsistencies in Epstein's methodology of constitutional interpretation¹⁸ rather than on refutation of his logic. For the moment, it is not important whether Epstein or his critics are correct in treating large-scale takings in the same way as individualized takings. We shall return to this point in exploring the ill-defined frontier between takings and taxation.

Having cast the takings net widely—"all regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state"¹⁹—Epstein reveals that the mesh of the net is fairly coarse. Despite his categorical assertions, Epstein admits that some regulations and taxes are justified as legitimate exercises of the "police power" that is "an inherent attribute of sovereignty at all levels of government."²⁰

The "police power" is not a one-size-fits-all garment, however. In Epstein's view, the police power should be used solely to curb

15. *See id.* at 64-66, 88-89.

16. *Id.* at 93-94.

17. *See, e.g., Sax, supra* note 3, at 280.

18. *See id.* at 280-85.

19. EPSTEIN, *supra* note 1, at 95.

20. *Id.* at 108.

wrongful private conduct. Only "the wrong of the citizen justifies conduct otherwise wrongful by the state as representative of and in defense of its other citizens."²¹ Consequently, the state may impose regulations that would otherwise be uncompensated takings when those regulations prevent or punish wrongful private behavior.

The line between valid regulations and regulatory takings is analogous to the line between self-defense and private necessity. "Self-defense allows one to inflict harm without compensating the person harmed, while private necessity creates only a conditional privilege, which allows the harm to be inflicted but only upon payment of compensation."²² In short, regulations that nibble away at any of the sticks in the property rights bundle are takings unless they are limited to public enforcement of the *sic utere maxim*.²³

An important specific exercise of the police power is the creation of regulations designed to curb nuisances. Regulations that operate to limit or prevent the use of property to create or continue a nuisance are justified even if they would otherwise constitute takings.²⁴ Contemporary regulatory takings doctrine embraces this principle by recognizing that regulation of property is not a taking so long as the regulation does "no more than duplicate the result [obtainable by private parties] . . . under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances."²⁵ Such regulations "[do] not proscribe a productive use that was previously permissible under relevant property and nuisance principles."²⁶

In the Epsteinian conception, most government regulations fall outside the scope of the police power and so constitute *prima facie* takings. The breadth of this conclusion is softened by Epstein's concession that compensation does not always have to be in the form of cash. Some takings, particularly "large-number takings" which are "in the form of regulations, taxation,

21. *Id.* at 111.

22. *Id.* at 110.

23. *Sic utere tuo ut alienum non laedes*—common law maxim meaning that all should use their property so as not to injure the property of others.

24. See EPSTEIN, *supra* note 1, at 108-12.

25. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

26. *Id.* at 1029-30.

and modification of liability rules,"²⁷ may be fully compensated by implicit in-kind compensation.²⁸ In general, "restrictions imposed by . . . legislation upon the rights of others [may] serve as compensation for the property taken."²⁹

Such implicit in-kind compensation is constitutionally sufficient for Epstein when the impact of the regulation is proportionate; that is, when after imposition of the restrictions, everyone has the same proportion of the pie as they had before. For example, bankruptcy legislation is a *prima facie* taking because it forces a disposition of contract rights. However, bankruptcy legislation delivers constitutionally sufficient implicit in-kind compensation because all creditors of the debtor suffer the same loss and all share *pro rata* in the debtor's assets.³⁰ All creditors lose, but none of them suffer a disproportionate impact. Similarly, natural resource conservation measures that prevent individual exploitation of a common pool, such as a fishery or a public forest, deliver full implicit in-kind compensation because the restrictions leave everyone with the same proportionate share of private property that they had before the regulations were imposed.³¹

By contrast, rent control schemes are blatantly disproportionate. In essence, rent control legislation results in government seizure of a leasehold, coupled with a forced option to renew at a fixed or formula price. The government then assigns the leasehold to a tenant and delegates to the tenant the government's duty to compensate the landlord. Of course, the compensation (in the form of rent) is always below the fair market value because that is the whole point of rent control. The effect of the scheme is to give tenants a larger share of the pie by taking a portion of the pie away from the landlord.

However, what Epstein concedes to regulation, in the form of implicit in-kind compensation, he takes away when he considers the limitations on takings imposed by the public use

27. EPSTEIN, *supra* note 1, at 195.

28. *See id.* at 195-215.

29. *Id.* at 195 (emphasis removed).

30. This conclusion holds true primarily for unsecured creditors. Secured creditors, by contrast, are generally left with their collateral security. Their contract rights are not materially damaged, because they are given the fruits of their contractual foresight in the form of the collateral security. *See generally* 11 U.S.C. §§ 501-10 (West 1996).

31. Nobody has any property interest in the common resource until it is reduced to possession. Thus, the restrictions impose no burdens on private property rights.

requirement. No property may be taken, even with payment of just compensation, unless the taking is for a public use. Under current doctrine, the public use requirement is satisfied whenever the taking is "rationally related to a conceivable public purpose."³² Even more broadly, the Court has stated that public use is "coterminous with the scope of a sovereign's police powers."³³ But as one commentator has pointed out, this statement is literally incoherent because the police power, "[l]egitimately exercised, . . . requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation any time its actions served a 'public use.'"³⁴ Epstein concurs: "the received wisdom, which trivializes the public use limitation, is incorrect. . . . To allow . . . indirect public *benefit* to satisfy the requirement for a public use is to make the requirement wholly empty."³⁵ This view is supported by the Supreme Court's conclusion that Hawaii had met the public use requirement through legislation that, in effect, compelled landlords to sell their property to their tenants.³⁶

Epstein argues that the public use requirement should be considered satisfied only when the government condemns property to provide a "public good" in the economic sense.³⁷ Public goods, so conceived, possess several characteristics: no one may be excluded from using a public good, one person's consumption of a public good will not impair others' consumption, and the marginal cost of provision of a public good is practically zero. National defense is the paradigmatic example, but there are few other examples of such pure public

32. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

33. *Id.* at 240.

34. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986).

35. EPSTEIN, *supra* note 1, at 162, 170.

36. See *Hawaii Hous. Auth.*, 467 U.S. at 233-34, 241-42. Academic commentary is typically in agreement with the Court. See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) ("[T]he modern understanding of 'public use' holds that any state purpose otherwise constitutional should qualify as sufficiently 'public' to justify a taking . . ."). Some commentators take a more thoughtful approach. See generally Merrill, *supra* note 34. Merrill argues that courts should use the public use requirement to scrutinize the means by which property is taken. In Merrill's view, public use is not satisfied when a private faction has captured the legislative process to take property for private gain (see, e.g., *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981)), or when the government acts because transaction costs are so high that they frustrate voluntary market transactions.

37. See EPSTEIN, *supra* note 1, at 166-68.

goods.

Epstein applies his theory to progressive taxation by concluding initially that taxation is a *prima facie* taking. He then considers whether progressive income or estate taxation delivers implicit in-kind compensation and satisfies his conception of the public use requirement.³⁸ Even assuming that the receipts from income and estate taxation are used entirely to deliver public goods (thus satisfying the public use requirement), Epstein concludes that the imposition of progressively higher tax rates fails to produce implicit in-kind compensation. Recall that Epstein's test for implicit in-kind compensation is whether the government action produces a *proportionate* impact on those affected. If the regulation instead has a disproportionate impact, that is, it changes the size of the pizza slices rather than just the size of the pizza, it fails to deliver implicit in-kind compensation. And, of course, progressive rate taxation has precisely this disproportionate effect. The intended *purpose* of progressive taxation is to affect taxpayers in a disproportionate fashion. It is easy to see why it takes Epstein only five pages to apply his theory to progressive taxation; the conclusion flows ineluctably from all that has gone before.

Epstein's theory is a powerful and elegant logical exposition of the limits on the power of governments to seize property, whether explicitly or through the protective cover of regulations. But it is only theory, and the Supreme Court shows few signs of embracing it wholesale. It is time then to ask whether Epstein's theory can be translated into the language of current doctrine.

II. CONSTITUTIONAL DECISIONS ON PROGRESSIVE TAXATION

None of the instances in which the Supreme Court has ruled upon constitutional objections to income or estate taxation, with or without progressive rates, has resulted in any opinion concerning the extent to which the Takings Clause might inhibit taxation. Indeed, the precise question—does the Takings Clause bar progressive rate taxation?—has never been presented to the Court. Some might argue that the failure to make the inquiry stems from near-universal acceptance of the validity of the progressive tax. Perhaps, but meek acquiescence on the part

38. See *id.* at 283-85, 295-305.

of the people does not operate as some sort of constitutional doctrine of prescription. The question is open; the Court is free to decide the issue.

The United States first imposed an income tax during the Civil War as an emergency war measure.³⁹ Annual income between \$600 and \$5,000 was taxed at 5%; income between \$5,000 and \$10,000 was taxed at 7.5%; income over \$10,000 was taxed at 10%.⁴⁰ A year later the rates were made steeper. The intermediate rate was eliminated and all income above \$5,000 was taxed at 10%.⁴¹ Shortly after the end of the war, the graduated rates were repealed. However, a uniform rate income tax persisted until 1872.⁴²

The constitutional validity of this progressive tax was attacked in *Springer v. United States*⁴³ as an unapportioned direct tax in violation of Article I, Section 2 of the Constitution, which requires that "direct Taxes shall be apportioned among the several States . . . according to their respective Numbers."⁴⁴ The Supreme Court rejected this challenge, relying upon historical evidence of the Framers' intent and dicta in *Hylton v. United States*,⁴⁵ a 1796 decision which held that a tax on carriages was not a direct tax requiring apportionment. Justice Noah Swayne, writing for the Court in *Springer*, concluded that direct taxes "are only capitation taxes . . . and taxes on real estate."⁴⁶ In upholding the progressive income tax of 1865, the Court never intimated any opinion about the validity of the tax's progressive rate, nor did the appellant raise the issue.

Springer was not the Court's first encounter with the validity of income taxation. In *Pacific Insurance Co. v. Soule*⁴⁷ the Court upheld a portion of the Civil War income tax that taxed the income of insurance companies at a single rate.⁴⁸ The insurance company attacked the government's construction of the statute and also contended that the tax was an invalid direct tax. As in

39. See Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281 (1864) (amended 1865).

40. See *id.*

41. See Act of March 3, 1865, ch. 78, 13 Stat. 469, 479 (1865) (repealed 1867).

42. See Blum & Kalven, *supra* note 2, at 427.

43. 102 U.S. 586 (1881).

44. U.S. CONST. art. I, § 2, cl. 3.

45. 3 U.S. 171 (1796).

46. *Springer*, 102 U.S. at 602.

47. 74 U.S. 433 (1869).

48. See Act of June 30, 1864, §§ 105, 120, 13 Stat. 223, 276, 283-84 (1864).

Springer, Justice Swayne delivered the Court's opinion. Relying almost entirely on statements by individual justices in *Hylton*, Justice Swayne concluded that the tax was indirect. No challenge was raised to the rate structure of the tax.

In *Scholey v. Rew*,⁴⁹ through the pen of Justice Nathan Clifford, the Court ruled that a "succession tax" on real property was not an unapportioned direct tax, but was instead an "excise tax or duty."⁵⁰ This was a curious explanation because just six years earlier the Court itself had defined an excise tax as either a consumption or sales tax.⁵¹ It is true that in that earlier case, *Pacific Insurance Co.*, the Court had intimated that a "duty" might be more than a customs impost, in that it might include all "things due and recoverable by law"—a meaning "hardly less comprehensive than 'taxes.'"⁵² But if duties and taxes were fungible, it was an unconscionable oversight for the Court to decide, as it then did in *Scholey v. Rew*, that because a "tax" was really a "duty" there was no need to decide whether or not the tax was direct. The reasoning in *Scholey* readily illustrates why Professor David Currie selected Justice Clifford as the all-time leader among Justices of the Court in "Inanities Per Page."⁵³ History has been spared Justice Clifford's views on the validity of progressive rates; the plaintiff in *Scholey* did not challenge the rate structure of the tax.

The Court's next foray into the constitutional validity of income taxation produced *Pollock v. Farmers' Loan & Trust Co.*,⁵⁴ the famous case that invalidated the income tax as a direct tax, thereby prompting the Sixteenth Amendment. The tax at issue in *Pollock*, enacted in 1894, taxed all income at one rate (two percent) but exempted the first \$4,000 of income. Although the tax was not progressive in its marginal rate structure, the relatively high exemption made it progressive in its effective

49. 90 U.S. (23 Wall.) 331 (1875).

50. *Id.* at 346.

51. See *Pacific Ins. Co. v. Soule*, 74 U.S. at 445.

52. *Id.*

53. David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 473-77 (1983).

54. 157 U.S. 429, modified on reh'g, 158 U.S. 601 (1895). In the first opinion, the Court invalidated the tax as applied to income from real property and from state bonds. As for the other issues, the eight Justices who heard the argument were equally divided and therefore no decision was reached. *Id.* at 586. Upon rehearing, with Justice Jackson bringing the Court to a full complement of nine, the Court voted 5-4 to strike down the remaining aspects of the income tax as an invalid direct tax.

rates.⁵⁵ Despite its prior rulings in *Pacific Insurance Co.* and *Springer*, the Court held that the tax was constitutionally defective because it was an apportioned direct tax. The Court did not base its decision on the progressivity of the tax. Although the taxpayer argued that the tax violated due process because its exemption of the first \$4,000 of income was arbitrary, the Court did not decide that issue.⁵⁶ Only Justice Field, in his concurrence, took a stance against the constitutional status of the progressive tax:

The income tax... discriminates between those who receive an income of four thousand dollars and those who do not... [T]his arbitrary discrimination... is class legislation [and thus violative of due process]... Whenever a distinction is made in the burdens the law imposes... by reason of... birth, or wealth, or religion, it is class legislation... [This tax] is the same in essential character as that of the English income tax statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate.⁵⁷

In the interim between *Pollock* and the ratification of the Sixteenth Amendment in 1913, the Court decided two cases involving the validity of progressive rate inheritance taxes. In both cases, the progressive rate structure was attacked as unconstitutional. In neither case, however, was that challenge based on the Takings Clause. In the first case, *Magoun v. Illinois Trust & Savings Bank*,⁵⁸ the plaintiff claimed that a progressive rate state inheritance tax violated equal protection. In the other, *Knowlton v. Moore*,⁵⁹ a taxpayer asserted that the graduated rates in a federal inheritance tax violated substantive due process, and challenged the federal inheritance tax as an unapportioned

55. To see the difference, compare two taxpayers—one with a \$50,000 income, and one with \$5,000 in income. The \$50,000 income taxpayer would pay a tax of \$920, 2% of \$46,000 income, or an *effective rate* of 1.84% of the taxpayer's total income of \$50,000. The \$5,000 taxpayer would pay a tax of \$20, 2% of \$1,000 income, or an effective rate of 0.4%. Both taxpayers would pay the same *marginal rate* of 2%. If those differences do not seem very significant, just multiply the flat rate by 10, making it a 20% rate. The \$50,000 taxpayer would then pay \$9,200, or an effective rate of 18.4%; the \$5,000 taxpayer would pay \$200, or an effective rate of 4%. See *supra* text accompanying notes 6-9.

56. See *Pollock*, 157 U.S. at 449 (argument of W.D. Guthrie, attorney for plaintiff-appellant).

57. *Pollock*, 157 U.S. at 596 (Field, J., concurring).

58. 170 U.S. 283 (1898).

59. 178 U.S. 41 (1900).

direct tax.

Magoun involved an Illinois inheritance tax that imposed a 1% tax on all property inherited by a decedent's close relatives and a 2% tax on all property inherited by more distant relatives. All other testamentary bequests were taxed at a series of rates ranging from 3% to 6%. The plaintiff alleged that the rates constituted a denial of equal protection. Over a lone dissent by Justice Brewer, the Court upheld the tax. Justice McKenna, newly appointed to Justice Field's former seat, delivered the Court's opinion. He concluded that the tax was not upon property, but upon the "right to take property by devise or descent," a right which "is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."⁶⁰

In our time, when almost everyone sneers at the distinction between rights and governmentally conferred privileges,⁶¹ many would question Justice McKenna's zealous embrace of this simple positivism. In any case, the Court found no violation of equal protection. Even though the tax operated unequally, "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."⁶² So long as exemptions and varying rates "proceed within reasonable limits and general usage, [they] are within the discretion of the state legislature."⁶³ The Court intimated that this reasoning would not have controlled if the tax had been applied to property. However, because "[t]he tax is not on money, [but rather] it is on the right to inherit," the Court found no barriers to its imposition in due process or equal protection.⁶⁴

Justice Brewer, who dissented, read the Court's opinion the same way. He stated that, "[i]t seems to be conceded that if this were a tax upon property [the graduated rates] could not be sustained."⁶⁵ Justice Brewer objected because he regarded the graduated rates as "purely arbitrary . . . wealth [classifications]—

60. *Magoun*, 170 U.S. at 288.

61. See, e.g., Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1988); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

62. *Magoun*, 170 U.S. at 295.

63. *Id.* (quoting *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237 (1890)).

64. *Id.* at 300.

65. *Id.* at 302 (Brewer, J., dissenting).

a tax directly and intentionally made unequal.”⁶⁶

The plaintiff in *Knowlton*⁶⁷ challenged a federal inheritance tax that imposed graduated rates on inheritances over \$10,000. The Court readily concluded that Congress had the power to tax the right of inheritance. After a lengthy discourse on the construction of the statute, Justice White, writing for the Court, relied upon *Scholey* to dismiss the argument that the tax was a direct unapportioned tax. Justice White improved upon Justice Clifford’s explanation of why the tax was not direct. Justice White stated that the tax was not on property at all, but rather upon the right to inherit property.⁶⁸ However misplaced this positivistic faith may have been, it was consistent with the Court’s prior ruling in *Magoun*.

Most of Justice White’s opinion in *Knowlton* was devoted to refuting the taxpayer’s contention that the progressive rates violated the Uniformity Clause, which requires that “all Duties, Imposts and Excises shall be uniform throughout the United States.”⁶⁹ Because the tax was not a direct tax, but a “duty or excise,” the Court was required to address the point. However, the Court concluded that the Uniformity Clause compelled only geographic uniformity. Finally, Justice White rejected the taxpayer’s contention that progressive rates were

so repugnant to fundamental principles of equality and justice that the law should be held to be void, even though it transgresses no express limitation in the Constitution. . . . In the absence of constitutional limitation, the [propriety of progressive rate taxation] . . . is [a] legislative and not [a] judicial [matter].⁷⁰

Nevertheless, Justice White hinted that *extra-constitutional* limits might apply to invalidate taxes, progressive or otherwise. He stated that

[i]f a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the

66. *Id.* at 303.

67. *Knowlton v. Moore*, 178 U.S. 41 (1900).

68. *Id.* at 81.

69. U.S. CONST., art. I, § 8, cl. 1.

70. *Knowlton*, 178 U.S. at 109.

protection of the individual, even though there be no express authority in the Constitution to do so.⁷¹

Although the Court was willing to entertain the idea of unenumerated rights, albeit dismissing their application in this case, it gave no consideration whatsoever to the *explicit* constitutional limitations of the Takings Clause.

Ratification of the Sixteenth Amendment enabled Congress to enact an income tax without apportioning it by population. *Pollock* had ruled that, although income taxes were indirect, taxes on income derived from property (such as rents, dividends, and interest) were direct taxes on property, and thus invalid unless apportioned among the States. Because the object of the late nineteenth century income tax was to tax the fruits of capital, this holding made the income tax useless. No one wanted to tax wages, salaries, or professional incomes alone. Therefore, if income derived from capital could only be taxed on an apportioned basis, the income tax could easily be evaded by a wholesale relocation of capital-derived income to less populous States. The Sixteenth Amendment removed the apportionment obstacle. Less than six months after its ratification, Congress enacted a comprehensive tax, which was retroactive to the effective date of the Amendment.⁷²

The validity of the new tax was promptly placed at issue in *Brushaber v. Union Pacific R.R. Co.*⁷³ Edward White, by then Chief Justice, once again wrote for the Court. The bulk of Chief Justice White's opinion was devoted to refuting the plaintiff's contention that the tax exceeded congressional powers. The Sixteenth Amendment did not enlarge Congress' power to impose an income tax; it simply relieved Congress of the obligation to impose an income tax in a particular mode, that is, apportioned among the States by population.

The plaintiff also attacked the progressive rates as violative of substantive due process. Chief Justice White responded that it was "well settled" that the Due Process Clause "is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing

71. *Id.* at 109-10.

72. This tax was officially named the Tariff Act of October 3, 1913, ch. 16, § 2, 38 Stat. 114, 166-81 (1913).

73. 240 U.S. 1 (1916).

power and taking the same power away, on the other, by the limitations of the due process clause."⁷⁴

In his next sentence, however, Chief Justice White "conceded" that the Fifth Amendment controlled Congress's taxing power. The Fifth Amendment would invalidate

a seeming exercise of the taxing power, [if] the act complained of was so arbitrary as to [be] . . . not the exertion of taxation, but a confiscation of property; that is, a taking . . . in violation of the Fifth Amendment; or, what is equivalent thereto, [if it] was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.⁷⁵

Chief Justice White, borrowing the circular logic of Justice Clifford, argued that the Due Process Clause did not limit the taxing power except when it limited the taxing power. Regardless, the explicit limits of the Takings Clause were never mentioned or considered by the Court.⁷⁶

Chief Justice White, in *Brushaber* as in *Knowlton*, regarded the due process challenge to progressive rates as rooted in a constitutionally unenumerated right. He stated:

[I]t is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process.⁷⁷

Chief Justice White remarked that this argument was "necessarily foreclosed by the ruling" in *Knowlton*.⁷⁸ Upon reexamination of *Knowlton*, this comment seems only to signify that the graduated rates at issue under the 1913 income tax were neither sufficiently arbitrary nor sufficiently confiscatory to merit the invocation of unenumerated rights.

74. *Id.* at 24.

75. *Id.* at 24-25.

76. The lawyers for the taxpayer did argue that the statutory obligation to withhold sufficient interest to meet the recipient's tax liability was a taking because it compelled the interest payer to perform uncompensated "compulsory service." See *id.* at 3 (argument of Julien T. Davies). The Court made short work of this rather fanciful suggestion. See *id.* at 21, 24. The more direct takings argument—that graduated rate taxation of income constitutes a taking of the marginal increments of income paid to extinguish the tax liability resulting from application of graduated rates—was never made by counsel nor considered by the Court. The graduated rates were challenged only insofar as they might deny substantive due process.

77. *Id.* at 25.

78. *Id.*

Since *Brushaber*, the Court has not reconsidered the constitutional validity of progressive rate taxation. The Court has upheld progressive rate taxation of estates on the dubious theory that the right to inherit is a privilege granted by an omnipotent sovereign, a privilege that can be conditioned at the sovereign's discretion. The Court has also upheld progressive rate income taxation against a substantive due process challenge. The Court held, in essence, that the progressive tax was rationally related to a legitimate state interest. The limits imposed by the Takings Clause on progressive rate taxation remain territory totally unexplored by the Court.

III. THE BOUNDARY BETWEEN TAXATION AND TAKING

Does the Takings Clause at all limit the government's taxation power? Relying on dicta to decide, in *Pacific Insurance Co.*,⁷⁹ that an income tax on insurance companies was a valid indirect tax, Justice Noah Swayne delivered some dicta of his own:

Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. . . .

....

The taxing power is given in the most comprehensive terms. The only limitations imposed are: that *direct taxes*, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.⁸⁰

Those who are fond of clinging to *obiter dictum*⁸¹ may seize upon Justice Swayne's pronouncement as an indication of the Supreme Court's view that the Takings Clause imposes no limits on taxation. By parity of reasoning, however, one might successfully contend that the Equal Protection Clause has no

79. *Pacific Ins. Co. v. Soule*, 74 U.S. 433 (1869).

80. *Id.* at 443-46.

81. Latin for jurisprudential flotsam and jetsam. Both are primarily useful as a last resort.

effect on taxation and, therefore, that a tax imposed on the basis of race alone would be impervious to assault.

Justice Swayne, of course, rivalled Justice Clifford in his lack of ability. David Currie, a fastidious student of the Court, characterizes Justice Swayne's opinions as "below standard."⁸² Peter Magrath, in his biography of Chief Justice Morrison Waite, asserts that Justice Swayne was President Lincoln's weakest appointment to the bench.⁸³ Charles Fairman, in his biography of Justice Samuel Miller, who was Justice Swayne's colleague, stated that Wallace, the Court's Reporter, thought the Court would be better off without Justice Swayne.⁸⁴ On balance, we can safely dismiss the probative force of Justice Swayne's hastily disgorged pearl of wisdom. In any case, Justice Swayne's dictum at least admits there are some constitutional limits on taxation, albeit only limits pertaining to the *mode* or subject of taxation.

Taxation and takings are inherently in tension with each other. Without looking at independent constitutional limits, the scope of the government's power to tax seems virtually boundless. However, the Takings Clause, like the Free Speech and Equal Protection Clauses, is an independent constitutional limit on the taxing power. As previously pointed out, no one would argue that the Equal Protection Clause would permit an income tax system that imposed differential rates based on the race of the taxpayer.⁸⁵ Similarly, no one would contend that the Free Speech Clause would allow an income tax system that imposed higher tax rates on income derived from the authorship of political books as compared to rates imposed on income from other sources.⁸⁶

82. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 452 (1985).

83. See C. PETER MAGRATH, *MORRISON R. WAITE: THE TRIUMPH OF CHARACTER* 101 (1963).

84. See CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890*, at 382 (1939). In fairness to Justice Swayne, Wallace was of the opinion that Nathan Clifford was even worse. "Was there ever 'such a man . . . in *such a place*?' wondered Wallace. *Id.* David Currie rates Clifford a top contender for the dubious distinction of "Most Insignificant Justice." See Currie, *supra* note 53, at 473-77.

85. Of course, in the case of a federal income tax, it is the "equal protection" component of the Fifth Amendment's due process clause that applies. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). The content is the same, however. See, e.g., Kenneth Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. Rev. 541 (1977).

86. See, e.g., *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

Likewise, the Takings Clause necessarily limits the taxing power. After all, taxation is, by definition, a taking. Surely the government takes your property if government officers enter your home and haul off your piano. How then is it not a taking if, instead, the government imposes a tax liability on you that you can only extinguish by surrendering your piano? The problem remains the same when we shift the analysis from tangible to intangible property. Surely the government takes your property if it simply seizes your bank account. How then is it not a taking if the government instead imposes a tax liability on you that you can only extinguish by surrendering a large portion of your bank account?

It is simply too facile to respond that, because the federal government has explicit power to tax, taxation is exempt from the otherwise applicable limits on governmental action. According to this argument, the Takings Clause is applicable only to those takings that occur outside the realm of taxation. Proponents of this view reason that, because taxation necessarily involves the taking of property and the government was given the power to tax, the Takings Clause must be read as limiting only governmental takings of property by means other than taxation.

This argument cannot stand because it fails to account for the central purpose of the Takings Clause, which is to avoid imposing the full cost of public benefits on a few people.⁸⁷ The purpose behind the Takings Clause is to prevent the forcible redistribution of private property for public benefit (unless the owners are compensated).⁸⁸ Surely an income tax of 100% imposed on a single individual—for example, Bill Gates—would violate the Takings Clause. If that is so, then the problem becomes a matter of degree. Is a 100% income tax that applies

87. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (explaining that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

88. See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 1565 (2d ed. 1991).

[T]he evil at which the eminent domain clause is aimed . . . involves at least some sorts of redistribution of resources. The clause reflects a judgment that if government is seeking to produce some public benefit . . . the payment [must] come from the public at large—taxpayers—rather than from identifiable individuals.

Id.

only to the ten highest income earners in the nation any better? If not, then why does the problem disappear when the 100% income tax applies to the 2.5 million highest income earners in the nation?⁸⁹

According to Justice Swayne's ill-considered dictum,⁹⁰ the Constitution at the very least controls the *mode* by which taxes are levied. The mode of taxation must be examined in order to analyze the intersection between takings and taxation, because the mode implicates both the concerns of the Takings Clause and the boundaries of the taxing power. As two commentators have noted, "progression cannot be defined meaningfully without reference to its redistributive effect on wealth or income."⁹¹ Moreover, many of the justifications offered for progressive taxation reflect an uneasiness about the validity of the mode of graduated rates.

As early as 1885, Justice Horace Gray acknowledged the existence of tension between taxation and the Takings Clause. In *Cole v. La Grange*,⁹² Justice Gray opined that taxation "requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes."⁹³ In this statement he made both a frank concession that taxation must be reconciled with the Takings Clause and a promising start toward that end. Justice Gray was undoubtedly correct in asking whether the taking produced by taxation is fully compensated by the provision of public benefits through general expenditures, but he may have been too sanguine about the certainty of this compensation.

The benefit principle invoked by Justice Gray posits that the benefits purchased by tax revenues are roughly equivalent to the tax liability.⁹⁴ At a minimum, benefit theory requires that

89. See, e.g., WALTER J. BLUM & HARRY KALVEN, JR., *THE ANATOMY OF JUSTICE IN TAXATION* 9 (1973) ("Since the essence of taxation lies in coercive takings by government, there is always the question of how the act of taxing has affected the distribution of property or income among citizens."). But if the tax as applied to a single individual is no taking, there is no problem if applied to large numbers. See text accompanying note 122 *infra*.

90. See *supra* text accompanying footnotes 79-84.

91. Blum & Kalven, *supra* note 2, at 486.

92. 113 U.S. 1 (1885).

93. *Id.* at 7-8; see also Richard A. Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 372-73.

94. For a general exposition of benefit theory, see, for example, EDWIN R.A. SELIGMAN, *PROGRESSIVE TAXATION IN THEORY AND PRACTICE* 150-229 (2d ed. 1908).

benefits increase as income increases. This is a formidable and uncertain task. The distribution of governmental benefits cannot easily be traced with any degree of accuracy. Perhaps all that need be shown is a rough correlation between benefits and income. Even so, a successful defense of progressive tax rates must demonstrate that as a taxpayer's income increases, the taxpayer receives an *ever-increasing proportion of the public benefits* purchased with tax revenues. If this correlation cannot be proven, all that can be established is that the amount of public benefits received is roughly proportional to income. While this may be adequate to defend a proportional tax, such as the so-called "flat tax" which taxes all income at a uniform *rate*, it is no defense for progressive rate taxation.

The two standard benefit theory arguments fail to establish that the *share* of public benefits received increases with income. First, the "property benefits" argument proposes that while personal benefits may be roughly equal for everyone, public benefits to property increase with the amount of property owned.⁹⁵ Second, the "income-equals-benefit" approach holds that income or wealth is the common measure of the personal well-being protected by government; thus benefits received are axiomatically proportional to income.⁹⁶ While each of these theories may suffice to justify single-rate proportional taxation, both fail to justify progressive rate taxation.

The "property benefits" argument fails because it is simply not true that public expenditures on property increase with the amount of property. Public benefits to property inhere in the protection of property. National defense, internal security (such as police and fire protection), and the legal system are all public benefits critical to property protection. But providing these benefits in sufficient quantity to protect persons will also necessarily protect property. A national defense that is adequate to protect Americans from external harm to their persons will also protect their property at no extra cost. Moreover, the level of protection necessary to defend tangible property does not vary proportionally with its value. An architecturally exquisite small cottage on Telegraph Hill in San Francisco is hideously expensive, but the cost of providing police and fire protection is

95. See Blum & Kalven, *supra* note 2, at 452-53.

96. See *id.* at 453-54.

no more (and probably less) for the cottage than it is for a run-down large house in a less desirable quarter of the city.

Finally, the cost of protecting intangible assets is a fixed cost, unrelated to the assets' value. In order to protect intangible assets such as securities, bank accounts, or private pensions, the government must provide system protection that does not vary with the value of the protected assets. For example, the legal system sufficiently protects bank accounts by punishing people who steal money. The cost of protecting certain types of property, such as deposit insurance for savings accounts, may increase with property value, but the rate of increase is proportional to the increase in property value, not disproportionately greater. The "property benefits" argument is a rather poor justification for single-rate proportional taxation, it completely fails to justify progressive rate taxation.

The "income-equals-benefit" approach is a tautology. Using income to measure benefits received provides the perfect justification for a single-rate proportional tax. It does nothing, however, to justify progressive rate taxation. Proponents of this approach usually claim that benefits accrue only to the portion of income in excess of what is necessary to purchase the bare necessities of life.⁹⁷ This fillip simply justifies Steve Forbes's version of a single-rate proportional tax—one that applies to all income above a minimum exempt amount. In order to justify progressive rates, one must demonstrate that the proportion of benefits received increases with income. Of course, this theory cannot prove this contention, because it simply equates income with benefits received, rather than relying upon some other measure of benefits.

Benefit theory is adequate to the task for which it was invoked by Justice Gray—to explain why *taxation* is not an uncompensated taking—but it fails to explain why *progressive rate taxation* is not an uncompensated taking, because benefit theory does not prove that the share of benefits received increases with income. Something else must be tried for that task, and "sacrifice theory" is a classic attempt to do so.

Sacrifice theory "builds on the undeniably true observation that the payment of taxes represents a coerced contribution to the government. It... treats taxes as though they were a

97. See *id.* at 453.

confiscation of property. The problem then becomes one of confiscating in an equitable manner."⁹⁸ Equity "requires inflicting equal hurt on each taxpayer."⁹⁹ So far, this appears to be nothing more than another explanation for why a single-rate proportional tax is not an uncompensated taking. The wrinkle added by sacrifice theorists is the idea that the sacrifice should be expressed in terms of the "utility" of money rather than in terms of the monetary unit itself. According to this theory, the dollars you pay in taxes do not measure your sacrifice. Rather, your sacrifice is measured in terms of the "utils" of bliss surrendered by your tax payment. This, of course, requires sacrifice theorists to employ some fancy footwork to demonstrate that the utility of additional income is less for a high-income earner than it is for a low-income earner. At first, this seems intuitively obvious—an additional \$25,000 of income would probably be of less value to a person with an income of \$10 million than it would be to a person with an income of \$50,000. By this reasoning, the \$10 million income earner should pay a larger share of his dollar income in taxes than the \$50,000 income earner to produce a proportionately equal sacrifice of utility. Put another way, if one person's income equals 1,000 utils and another's income equals only 100 utils, sacrifice is proportionally equal if each taxpayer surrenders 10% of his total utility. If the utility value of income declines with increases in income, progressive tax rates are required to produce a proportionately equal sacrifice of utility.

Although theoretically neat, a closer look shows that sacrifice theory turns out to be a flop in practice:

To yield progressive rates of tax . . . the utility curve for money has to decline very sharply. Whatever the common sense of the notion that money has *some* declining utility, it can hardly be invoked to support the far more exacting notion that the order of the decline is very steep.¹⁰⁰

Therein lies the problem for sacrifice theorists, for no one has been able to demonstrate convincingly that the utility curve for money drops steeply enough to justify progressive tax rates.¹⁰¹

98. *Id.* at 455 (footnote omitted).

99. *Id.* at 455-56 (footnote omitted).

100. BLUM & KALVEN, *supra* note 89, at 18.

101. See, e.g., Blum & Kalven, *supra* note 2, at 462-65 ("Perhaps the most bizarre chapter in the intellectual history of progression consists in the many attempts to state

Accordingly, sacrifice theorists have turned to Jeremy Bentham and John Stuart Mill for the proposition that the proper goal of taxation is to minimize the total sacrifice of all persons in the taxed polity. In theory, minimal sacrifice would be achieved if tax revenue were obtained first from the least valuable dollars (dollars with a low util value). By this reasoning, high-income taxpayers should surrender all their marginal income until their income has been reduced to an average level of utility. This would spread the total sacrifice more evenly. This process of extreme income leveling would continue until all public revenue needs were met. As Walter Blum and Harry Kalven put it, "[t]his route to progression in taxation is astonishing. Its logic would dictate 100 percent marginal tax rates and the successive leveling of incomes after tax."¹⁰² Such rates might even tempt the ghost of Chief Justice Edward White to conclude that his extraconstitutional limits on taxation had been exceeded.¹⁰³

More to the point, "[t]he radical sweep of the conclusion dictated by the minimum sacrifice approach—however mild the slope of the money utility curve—served to call into doubt the key premise that money really had declining utility."¹⁰⁴ As it turns out, it is by no means certain that money has declining utility. Those who make the claim are far more likely to have an income of \$50,000 than an income of \$10 million. Money is incredibly versatile. It can be used to satisfy any consumption pleasure, however exotic. Money does not need to be spent to have utility. It is the vehicle for savings and investment—activities whose utility may well remain constant and may even increase with income. Money can also be given away, thus producing the utility rewards of philanthropy, which may also be constant or increase with income.

For sacrifice theory to help defend progressive tax rates, it is necessary to establish that every person has the same utility curve for money. But even the dimmest observer of humanity must concede that this is simply not the case. Some people are satisfied with very little money and make no effort to acquire

the shape of the curve. . . . All in all the attempts to discover more about the utility curve than the fact that it declines somewhat are interesting but not persuasive.").

102. BLUM & KALVEN, *supra* note 89, at 19.

103. See *supra* text accompanying notes 73-75.

104. BLUM & KALVEN, *supra* note 89, at 19.

more; others appear to have an insatiable desire for more money, regardless of how much they already have. Finally, attitudes toward money are likely to shift over time, even for a single individual. In the end, sacrifice theory is nothing more than a hopeless muddle of unprovable theory and a very bad explanation of human behavior. In short, sacrifice theory offers no defense against the charge that progressive rate taxation is a taking.

The remaining justifications for progressive rate taxation are even less capable of demonstrating that progressive rates are not a taking. One argument—that taxation should reflect one’s ability to pay—is merely a variation on sacrifice theory. Only by continuing to cling to the notion that the utility curve of money is steeply declining can one believe that it is “easier” for rich people to pay a larger *share* of their incomes in taxation than others with more modest incomes. Even less persuasive is the paternalistic contention that those who have large incomes will spend their money in a less “socially worthy” fashion than would either the government or taxpayers with modest incomes. The argument that governmental expenditures are more socially worthy is simply an argument for taking a disproportionate share of large incomes to accomplish public purposes. This is the very definition of a taking. The argument that modest income-earners spend their money on more socially worthy necessities, such as food, clothing, and shelter, while rich people spend their money on frivolities, such as flowers, ski vacations in Chile, champagne, and caviar, is merely an argument for a tax exemption for the income necessary to provide for bare necessities of life. The argument says nothing at all about the justice of progressive tax rates.

All the justifications that have been offered for progressive taxation reflect the uneasy relationship between taxation and takings. Some taxation is necessary and clearly constitutionally permissible. The problem with progressive taxation lies in the mode by which the tax is levied. The essential purpose of the Takings Clause is to prevent the use of public power to force a minority of people to surrender their property for public benefit without compensation. Of course, progressive rate taxation is designed to cause a minority of people, those with high incomes, to surrender a larger portion of their property than others for the public benefit. None of this would be

problematic if it could be demonstrated, even roughly, that the disproportionate surrender of income was fully compensated in some way. Benefit theory attempts to do so, but fails. Sacrifice theory attempts to show that the disproportionate seizure of income resulting from progressive tax rates is really not disproportionate. However, this attempt is in vain, because sacrifice theory relies on an imaginary Benthamite calculation of utils instead of the cold, hard cash of the real world.

There is simply no escaping the fact that the Takings Clause is intended to limit the government's power to seize private property without compensation for the purpose of redistributing it to others. This is true regardless of how much public benefit might be produced by the transfer. Likewise, there is simply no escaping the fact that progressive income taxation is intended to redistribute income from high-income taxpayers to those with lower incomes.¹⁰⁵ The clash between progressive taxation and the Takings Clause means that progressive rates are a taking unless those subject to graduated rates are fully compensated, or unless all forms and modes of taxation are exempt from the Takings Clause. As we have seen, however, the Supreme Court has never recognized such an exemption.

IV. CURRENT REGULATORY TAKINGS DOCTRINE AND PROGRESSIVE TAXATION

Given the conclusions in the previous section, it is time to examine the possibility that progressive tax rates result in the taking of property without just compensation. The Court's regulatory takings doctrine employs a two-step process composed of three litmus-test rules and a catch-all balancing test. Only if the litmus-test rules fail to dispose of the problem is the general balancing assessment undertaken. Two of the

105. In 1991, incomes comprising the top 1 percent of all incomes paid 24.7% of the total federal individual income tax; the top 5 percent of incomes paid 43.5% of the total federal individual income tax; the top 10 percent of incomes paid 55.4% of the tax; the top 25 percent of incomes paid 77.3% of the total tax; and the top 50 percent of incomes paid 94.5% of the total federal individual income tax. *See* HALL & RABUSHKA, *supra* note 2, at 45. By contrast, 1991 federal spending on Medicare, Medicaid, welfare assistance and other social welfare programs amounted to about 52% of all federal expenditures, and virtually all of those expenditures were delivered to those in the bottom 50 percent of incomes. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 332 (114th ed. 1994).

litmus-test rules, permanent dispossession and loss of all economically viable use, are potentially applicable to progressive rate taxation. The third litmus-test rule, common law nuisance abatement, is not.

A. Permanent Dispossession

When regulations of property permanently dispossess an owner of his property, a per se taking has occurred. The per se rule is usually associated with *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁰⁶ in which the Court held that New York had effected a taking by authorizing Teleprompter to affix its coaxial cable to a minute portion of Mrs. Loretto's apartment building, thereby dispossessing her of a sliver of her property. Two years earlier, the Court reached the same conclusion with respect to intangible property—namely, money. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,¹⁰⁷ the Court held that government appropriation of the interest income earned on private funds deposited into court in an interpleader case was a taking. The State of Florida contended that the deposited fund was "'public money' because it [was] held temporarily by the court."¹⁰⁸ The Court rejected the argument and held that, "a State, by *ipse dixit*, may not transform private property into public property without compensation This is the very kind of thing that the Taking Clause . . . was meant to prevent."¹⁰⁹ Lest there be any doubt following *Beckwith*, the Court in *Ruckelshaus v. Monsanto Co.*¹¹⁰ made it absolutely clear that the Takings Clause applies to both tangible and intangible property. In *Monsanto*, a federal regulation that required public disclosure of certain of Monsanto's proprietary trade secrets was held to be a taking of the company's intangible property.

Because all taxation results in the permanent dispossession of taxpayers' property, but taxation is presumptively valid, there remains the problem of defining the frontier between valid taxation and taxation that constitutes an uncompensated regulatory taking. The issue is whether the *marginal increment* taken by progressive tax rates is an uncompensated taking.

106. 458 U.S. 419 (1982).

107. 449 U.S. 155 (1980).

108. *Id.* at 164.

109. *Id.*

110. 467 U.S. 986 (1984).

Generally, taxation is defended against takings analysis by asserting that taxation "requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes."¹¹¹ This is surely an adequate justification for a single-rate system in which each taxpayer pays the same proportion of his income in taxes.¹¹² But it fails to justify a taxation system that takes an ever-increasing share of a taxpayer's income. The whole point of the takings guarantee is to insure that private property is not taken to provide public benefits without delivery of just compensation to the property owner. The protection and benefits afforded by government ought to be public goods, that is, goods which are freely consumable by all without diminishing the ability of others to consume. To the extent that government provides only public goods, the benefits produced by taxation are shared pro rata by the polity. It is difficult to reconcile a disproportionate taxation system with proportionate delivery of public benefits.

Government, however, does much more than provide public goods. Many of the benefits delivered by government are designed to be enjoyed by only a select few beneficiaries. Two examples of such government benefits are farm commodity subsidies and welfare entitlements. These government expenditures produce public benefits in which all Americans share indirectly, but the principal beneficiaries are the targeted recipients. It is even more difficult to defend disproportionate taxation when such taxes are levied to support government expenditures on non-public goods expenditures that are undertaken to benefit specific portions of society. Only by ignoring the central premise of the Takings Clause and enthusiastically embracing a taxing power that is not limited by the Constitution is it possible to pound the square peg of disproportionate taxation into the round hole of compensatory benefits. If there is to be any intellectual honesty, the nettlesome problem of disproportionate taxation as a takings issue cannot be ignored. "Since the essence of taxation lies in coercive takings by government, there is always the question of how the

111. *Cole v. La Grange*, 113 U.S. 1, 8 (1885).

112. To the extent that some minimal level of income is exempt from taxation, the effective rate of taxation is progressive, never quite reaching the stated rate because of the initial exemption. The technical term for this phenomenon is *degression*. Of course, all taxpayers pay the same proportion of their taxable income in taxes.

act of taxing has affected the distribution of property or income among citizens."¹¹³ Absent some reasonable demonstration that the *disproportionality* of the taxation (or taking) is justified by disproportionate compensatory benefits, the disproportionate feature—the graduated tax rates—is an uncompensated taking.

Defenders of progressive rates may well assert that such rates are valid so long as they are rationally related to a legitimate government interest.¹¹⁴ The invocation of minimal scrutiny, a familiar and well-settled concept that is applied to challenges of economic regulations under due process or equal protection, has no place in the law of regulatory takings.¹¹⁵ If a per se takings rule is involved and is dispositive, that ends the matter. If not, the government is required to establish that the regulation at issue is substantially related to a legitimate state objective.¹¹⁶ Analysis of the factors the Court uses to make that assessment is deferred;¹¹⁷ for the moment it is enough to note that regulatory takings doctrine is stricter than due process or equal protection.

Defenders of progressive taxation would undoubtedly assert that it makes no sense to apply the permanent dispossession rule only to the marginal increments of income taken by progressive taxation, but to concede that taxation generally is valid despite the permanent dispossession rule. The reason to do so is inherent in the central problem of regulatory takings. In trying to decide when "regulation goes too far . . . [and] will be recognized as a taking,"¹¹⁸ the Court essentially struggles with the degree of deference to give to legislative judgments. In the case of permanent dispossession or regulations that strip owners of all economically viable use of their property,¹¹⁹ the Court is

113. BLUM & KALVEN, *supra* note 89, at 9.

114. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 843-48 (1987) (Brennan, J., dissenting) (arguing that minimal scrutiny applies to regulations challenged as a taking). The Court specifically rejected Brennan's argument. See *Nollan*, 483 U.S. at 834 n.3.

115. See *id.* at 834 n.3 ("[I]n the takings field . . . [w]e have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, . . . not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.'").

116. See, e.g., *Nollan*, 483 U.S. at 834; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (use restrictions on real property are takings if not "reasonably necessary to the effectuation of a substantial government purpose").

117. See *infra* text accompanying notes 141-49.

118. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

119. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Agins*,

satisfied that *no* discretion should be accorded the legislature. By contrast, the Court allows legislatures virtually unlimited discretion to adopt regulations to abate public or private nuisances that are actionable at common law.¹²⁰ When the three litmus-test rules do not apply, the Court finds regulations valid if they *substantially advance* the government's actual and legitimate objective.¹²¹ When the problem is the unique one of deciding what permanent dispossession produced by taxation is permissible and what is not, the Court necessarily must decide how much discretion Congress or state legislatures may have in imposing unequal, disproportionate permanent dispossession.

From one perspective, the case is simple. The marginal income increment taken by graduated rates is a unique dispossession, experienced by only those taxpayers with sufficient income to trigger any graduated rate. Comparing *Loretto* to the issue of progressive taxation illustrates this point.

When New York authorized cable television operators to dispossess owners of apartment buildings of a sufficient portion of their property to affix coaxial transmission cables, it imposed a unique dispossession on a potentially numerous class of people. It did not matter that the minute amount of property dispossessed may have had very little utility to the owner. Apart from the Takings Clause and other independent constitutional limits, New York surely had plenary authority to permit cable television operators to install their cables for the public benefit.

When Congress enacted progressive rate income taxation, it dispossessed owners of modest to large incomes of a disproportionate share of their income (consisting of the sum of the marginal increments of tax above that produced by the lowest tax rate), a unique dispossession imposed on a numerous but identifiable class of people. It should not matter that the incremental income taken may have great or little utility to its owner. Apart from the Takings Clause and other independent constitutional limits, Congress surely had plenary authority to impose an income tax in whatever form it desired.

From a second perspective, the case is equally simple. Taxation is simply exempt from the Takings Clause. Congress

447 U.S. at 260-61.

120. See *Lucas*, 505 U.S. at 1003, 1017-20.

121. See *Nollan*, 483 U.S. at 834 n.3.

and state legislatures have complete discretion to impose income taxes at whatever rates they regard as appropriate. In essence, the claim is that minimal scrutiny, at most, applies to the question of whether graduated rates are a taking. But this second position has many flaws. The view that taxation is exempt from the Takings Clause has never been adopted by the Court in the face of a takings challenge, perhaps because it is inconsistent with the core conception of the Takings Clause, ignores the fact that the Constitution does impose limits on the mode of taxation, and is at odds with the Court's repeated statement that the Takings Clause imposes sharper limits on government regulation than those imposed by the Due Process or Equal Protection Clauses.

In truth, the problem is not susceptible to a simple resolution. Surely legislatures are entitled to considerable discretion in deciding how to tax incomes to provide public benefits. But if Congress or a state legislature selects a mode that cuts right to the heart of the Takings Clause, the courts must either curtail legislative discretion or abandon the Takings Clause. The Court has signalled clearly its unwillingness to consign regulatory takings to the same dustbin in which it has tossed due process and equal protection scrutiny of economic regulations. Thus the remaining option is to adopt a constitutional rule of proportional taxation, a single flat rate on all taxable income, which would leave legislatures with wide discretion while preserving the core values of the Takings Clause.

A constitutional requirement that income may be taxed only at a uniform rate would permit legislatures to decide whether to exempt any income from taxation and, if so, how much of an exemption to provide. A legislature bent on taxing primarily the incomes of the rich could conceivably set an exemption equal to the median income of the United States¹²² or even somewhat higher, and impose a high rate (perhaps 50%) on all income earned above the amount exempted. The result would be a sharply progressive effective rate, approaching, but never quite equalling, 50% for very high-income taxpayers. Moreover, legislatures would retain discretion to select the rate at which incomes are to be taxed. If taxation of only the very rich did not

122. In 1992, the median was \$31,553 for all households. This figure is estimated in 1993 dollars. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 469 (115th ed. 1995).

provide sufficient revenue to fuel desired government programs, then legislatures would be free to tinker with either the exemption or the rate, or both, in order to produce the optimal mix. The revenue-neutral flat tax proposed by Robert Hall and Alvin Rabushka, for example, incorporates a modest personal exemption and a rate of 19% on all individual compensation income; business income would be defined in a more encompassing fashion, but would also be subject to the 19% rate.¹²³ Presidential candidate Steve Forbes proposed a rate of 17%.¹²⁴ Senator Phil Gramm urged 16%.¹²⁵ The important point is that the merits of any proposed flat tax are for Congress to decide. What Congress ought not be permitted to decide, if the Constitution is to be taken seriously, is whether it wishes to impose differential tax rates simply to dispossess some people of a disproportionately greater share of their income. A flat tax would simultaneously preserve legislative discretion and the *raison d'être* of the Takings Clause, and would also be simple to administer judicially. There would be no spate of follow-on cases challenging the validity of exemptions or definitions of taxable income.

B. No Economically Viable Use

If a regulation of property leaves the owner with no economically viable use, it is a taking.¹²⁶ The rule has been developed with respect to real property, and its principal application is to land-use regulations. Nevertheless, given the Court's conclusion that intangible property is equally entitled to the protection of the Takings Clause,¹²⁷ it is surely the case that some governmental regulations of intangible property would deprive the owner of all economically viable use. A requirement that all of an individual's annual income in excess of \$100,000 be donated to charity would deprive the individual owner of all economically viable use of the income in excess of \$100,000. Is the case any different if the requirement imposed is that the individual surrender a disproportionate share of the income in

123. See HALL & RABUSHKA, *supra* note 2, at 55-58.

124. See Sloan, *supra* note 8.

125. See Jonathan Peterson & Ronald Brownstein, *GOP Panel Calls for Switch to Flat-Tax System*, LOS ANGELES TIMES, Jan. 18, 1996, at A1.

126. See *Lucas*, 505 U.S. at 1003.

127. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

the form of taxation? The portion of the affected individual's intangible property for which he is denied economic use is smaller, but otherwise the cases are identical.

The problem created by looking at disproportionate taxation as a destruction of all economically viable use of the marginal incremental share of income taken in taxation is that there is no certainty that the marginal increment taken in taxation is a separate strand of property for takings purposes.¹²⁸ In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,¹²⁹ the Court upheld a Pennsylvania law that required underground coal miners to leave sufficient coal in place to support the surface. The Court ruled that the twenty-seven million tons of coal that Pennsylvania forced miners to leave in place to support the surface did "not constitute a separate segment of property for [federal] takings law purposes."¹³⁰ This ruling was issued despite the fact that Pennsylvania law considered underground support of the surface a separate legal estate. Because the coal left in place was only a small fraction of the total amount of coal that could be removed, the miners had "not come close to . . . proving that they have been denied the economically viable use of [their] property."¹³¹

The Court made its most recent pronouncement regarding the problem of conceptual severance in *Lucas v. South Carolina Coastal Comm'n*,¹³² where the Court admitted that the

'deprivation of all economically feasible use' rule . . . does not make clear the 'property interest' against which the loss of value is to be measured. . . . The answer to this difficult question may lie in . . . whether and to what degree the State's law has accorded legal recognition and protection to the particular [property] interest . . . with respect to which the takings claimant alleges a diminution in (or elimination of) value.¹³³

In *Lucas*, the takings claimant had asserted a total loss of economic use in two fee simple titles, and the South Carolina

128. Of course, there is also the threshold issue of whether taxation is a taking and, if so, under what circumstances. That issue has been dealt with and is assumed for purposes of this subsection. See *supra* text accompanying notes 79-105.

129. 480 U.S. 470 (1987).

130. *Id.* at 498.

131. *Id.* at 499.

132. 505 U.S. at 1003.

133. *Id.* at 1016 n.7.

trial court had determined that South Carolina's Beachfront Management Act had "left each of Lucas's beachfront lots without economic value."¹³⁴

Similarly, in looking at the problem of progressive taxation, it is clear that the taxpayer has lost all economic use of that disproportionate share of income taken by the application of graduated tax rates. Is this property "accorded legal recognition and protection"¹³⁵ as a separate estate or interest? Money can surely be spent separately. Its function as a medium of exchange is its major virtue and reason for existence. The criminal law treats the theft of money as a taking of a distinct item of property, and uses the value of stolen property as a way to distinguish minor and major property crimes.¹³⁶

On the other hand, although Pennsylvania law regarded the support estate as a separate estate in land, the Court in *Keystone* rejected the idea that the coal required to be left in place should be considered separate and independent property whose economic value was taken by Pennsylvania's "leave-in-place" regulation. Following *Keystone*, a proponent of progressive taxation might more easily assert that the relevant property whose use has been interfered with is the taxpayer's income as a whole. From that perspective, progressive tax rates hardly strip the taxpayer of all economic use of his income.¹³⁷

Keystone may have rejected the notion of conceptual severance, but *Lucas* has now opened the door for further consideration of the idea. In that respect, the Court may merely be taking its cue from the Court of Federal Claims, which through the Tucker Act¹³⁸ has jurisdiction over damage claims against the federal government based on the Constitution,

134. *Id.*

135. *Id.*

136. See, for example, § 223.1(2) of the Model Penal Code (Official Draft, 1985), which classifies theft of property of \$500 or more as a third degree felony, theft of property valued between \$50 and \$500 as a misdemeanor, and thefts of less than \$50 as a petty misdemeanor.

137. Note that this argument implicitly admits that a tax rate of 100% on all income would deprive affected taxpayers of all economic use of their property. If so, then proponents of the argument are required to explain why a 99% tax rate does not do the same thing, and are also in the embarrassing position of having conceded that the Takings Clause applies to taxation. Of course, die-hard defenders of disproportionate taxation are probably not about to concede that the taxing power is bounded by the Takings Clause. It would be politically incorrect to do so.

138. Tucker Act of March 3, 1887, ch. 359, 24 Stat. 505 (codified as amended at scattered sections of 28 U.S.C.).

federal laws or regulations, and contracts. The Court of Federal Claims has, in recent years, warmly accepted claims of conceptual severance.¹³⁹ Perhaps *Lucas* is merely an augury of the Court's more general acceptance of conceptual severance.

In any case, state courts have considerably greater freedom to interpret their own constitutional Takings Clauses and to apply conceptual severance.¹⁴⁰ In States that impose graduated income taxes, the highest courts are free to parse their own constitutional law so as to apply conceptual severance to graduated income taxes.

C. The Balancing Test

The consequence of rejecting conceptual severance in any particular case is that the balancing test is brought to bear. A regulation that substantially advances a legitimate state objective is not a taking. In assessing whether such advancement exists, courts examine a number of factors.

If the public benefits produced by the regulation are less than the private costs imposed, the regulation is unlikely to "substantially advance" the government's objective. But even if the public benefits created are greater than the private costs imposed, there is no automatic assurance that the regulation is not a taking. The relationship of public benefits to private costs is more relevant to the independent questions of whether the public use element has been satisfied and whether the property owner has received adequate compensation. Unfortunately, the ad hoc approach to regulatory takings championed by results-oriented justices, such as William Brennan, stirred this balancing issue into the general brew of regulatory takings.¹⁴¹

If the regulation fails to leave property owners with a

139. See Roger J. Marzulla & Nanci G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991).

140. See, for example, *Allingham v. City of Seattle*, 749 P.2d 160 (Wash. 1988), in which the Washington Supreme Court applied conceptual severance to find a Seattle "greenbelt" ordinance a taking under the Washington Constitution. The ordinance as applied eliminated the property owner's ability to use 70% of his property. Of course, because Washington does not impose an income tax there will be no occasion for the Washington Supreme Court to apply conceptual severance to the problem of graduated income tax rates.

141. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 594-95 (1962) (characterizing regulatory takings doctrine as having no set formula). See also *Penn Central*, 438 U.S. at 124.

reasonable return on their investments, the regulation is almost certain to be a taking. In theory, there could be a tiny category of cases in which property owners are left with a return on their investments that is not "reasonable," but is still "economically viable." In practice, we are unlikely to see such a case.

If the regulation is arbitrary, it almost certainly will amount to a taking. However, an arbitrary regulation is also a denial of due process. As a result, there is no bite to this factor as a unique element of takings law.

If progressive rate taxation is not regarded as a permanent dispossession of a disproportionate share of the taxpayer's income, and is not treated as a destruction of all economically viable use of that conceptually severed strand of property, there is not much likelihood that the balancing test will produce a conclusion that graduated rates are an uncompensated taking. In the due process context, the Court has rejected the contention that graduated rates are arbitrary.¹⁴² It is extraordinarily difficult for the judiciary to divine whether a taxpayer's income, after deduction of the disproportionate segment of the income tax, represents a "reasonable" return on the taxpayer's labors and acumen. Any doubts on this score will surely be resolved in favor of the legislature. Thus, although the comparison of public benefits and private costs ought not be germane to the issue, this comparison provides the best arguments to the taxpayer.

As we have seen, there is no certainty that the public benefits produced by disproportionate taxation are shared by taxpayers in the same proportion as their forced contributions.¹⁴³ Nor is there any reason to be confident that the overall public benefits of progressive taxation outweigh the private costs imposed by the practice. Progressive taxation is undertaken in order to redistribute income from the relatively wealthy to the relatively poor.¹⁴⁴ This redistribution is often defended on the ground that it will increase the overall economic welfare of society. "It is urged that the wealthy will lose less welfare by surrendering a share of their income than the less wealthy will gain by getting

142. See *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916) (income tax); *Knowlton v. Moore*, 178 U.S. 41 (1900) (inheritance tax).

143. See *supra* text accompanying notes 94-97.

144. See *Blum & Kalven*, *supra* note 2, at 486-90.

it."¹⁴⁵ But this argument is nothing more than a restatement of the minimum sacrifice defense of progressive taxation.¹⁴⁶ An increase in the wealth of the poor will increase societal welfare only if the utility of the increased wealth to the poor is greater than the utility of the lost wealth to the rich. This is a highly debatable premise,¹⁴⁷ regardless of how strongly it may be held as an article of faith by votaries of the political left.

Moreover, even assuming that there is a net gain in welfare by redistributing income from rich to poor, there is no proof that the net gain is in the *general* welfare. "[A]ll that has happened is that the welfare of one group in the society has been increased at the expense of the welfare of a different group. . . . [T]here is no 'general' welfare; there is only the welfare of the two groups."¹⁴⁸ This sound economic argument, however, faces some large constitutional obstacles. Ever since *United States v. Butler*¹⁴⁹ the Court has generally deferred to the congressional judgment of what constitutes the general welfare. The Court has made pronouncements on that issue only in the context of testing the outer boundaries of congressional power to tax or spend. The Court has never been required to face the related but conceptually distinct issue of whether the term "general welfare" has a judicially ascertainable content as a factor in the balancing test for regulatory takings. For the regulatory takings balancing test to mean anything, it is the *Court* that must make the judgment of whether the public benefits of progressive taxation outweigh the private costs imposed. It simply will not do to pretend that the Court is balancing factors if the Court is simply accepting congressional judgment about the factors to be balanced.

Judicial assessment of the costs and benefits produced by disproportionate taxation is not simple. Given the subjectivity of any such measurement, it might indeed be prudent to leave this task to the legislature. If we choose to do this, however, we have effectively repudiated judicial balancing in regulatory takings, at

145. *Id.* at 491. A classic defense of this general welfare approach to disproportionate taxation is Elmer D. Fagan, *Recent and Contemporary Theories of Progressive Taxation*, 46 J. POL. ECON. 457 (1938).

146. *See supra* text accompanying notes 98-104.

147. *See supra* text accompanying notes 100-101.

148. Blum & Kalven, *supra* note 2, at 491.

149. 297 U.S. 1 (1936).

least as applied to progressive taxation. Perhaps the answer to this dilemma is to require the government to sustain the burden of proving that the benefits of progressive taxation clearly outweigh its costs.

V. STATE CONSTITUTIONAL LAW

Every State has independent constitutional guarantees against the uncompensated taking of private property for public use. Many States impose graduated income taxes. Each of these States is free to assess the validity of progressive state income taxation under the state takings guarantee, independently of the federal constitutional law of regulatory takings.

State supreme courts are free to recognize forthrightly that taxation is bounded by the state takings guarantee, accept the principle that disproportionate taxation is a permanent dispossession of intangible property, or embrace conceptual severance and admit that all economic value is lost with respect to the marginal increment of income taken by progressive taxation. All that the courts need is independence of thought.

Decades of acceptance of the assumption that taxation is immune to any challenge whatsoever under the Takings Clause has caused judicial minds to close to the inescapable fact that taxation is a taking. It is surely a justified and fully compensated taking when applied proportionally to all taxpayers. However, the idea of taxing some people at higher rates simply because of their greater economic success is presumptively offensive to the principle of the Takings Clause, which "was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁵⁰ The point of the Takings Clause was to prevent saddling the few with the public burdens that ought to be borne by the many. If income taxation is the indispensable means of supporting governmental programs from welfare to missiles, then the tax burden on incomes—the "taking" from income—should be an equal proportion of all income subject to tax. States are free to implement these basic principles of equality through their own constitutional law of takings.

150. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

VI. CONCLUSION

The United States Supreme Court has never decided the question of whether progressive taxation is an uncompensated taking. Taxation is not, or at least should not be regarded as, immune from the strictures of the Takings Clause. Indeed, old dicta from the Court suggests that the Court regards taxation generally as a fully compensated taking. But that notion, while generally true, breaks down when applied to progressive taxation, which seizes a disproportionate share of taxpayer incomes. The point of the Takings Clause is that public burdens must be shared by the entire polity rather than placed upon a select few. Yet progressive taxation does just that, by extracting an ever larger proportion of income from the select few who have large incomes.

While it is true that economic regulation is subject to extremely deferential review under the Due Process and Equal Protection Clauses, the Court has made it very clear that the standard for regulatory takings is much stricter. Application of the standard doctrines developed by the Court for regulatory takings cases reveals that the constitutional case for progressive taxation is not impressive. The disproportional share of income taken by progressive rates is a permanent dispossession of intangible property, a condition the Court has stated triggers an automatic conclusion that the regulation (progressive tax) is a taking. Alternatively, if the Court were to accept conceptual severance as applicable to taxable income, it could conclude that the portion of income taken by progressive taxation is an uncompensated taking either because it is a permanent dispossession or because it deprives the taxpayer of all economically viable use of that severed strand of property. Even if the Court's incredibly open-ended balancing test applies, there is some doubt that the benefits of progressive taxation outweigh the private costs imposed.

Regardless, States that impose progressive income taxes are free to reach independent and differing conclusions on these issues by interpreting their own constitutional provisions concerning takings of private property for public use. There is no reason why state supreme courts should refrain from rigorous analysis of the validity of state progressive taxation schemes under the various state constitutional takings provisions.

It is often said that zen mind is beginner's mind, or that to gain the "kingdom of God" one must become as a child. Translated from the spiritual to the temporal, the mental habit of professionals is frequently to accept uncritically the unexamined premises underlying the body of professional knowledge. Lawyers and judges have too long assumed that taxation is beyond the control of the Takings Clause.¹⁵¹ That habit of mind occludes understanding. Lawyers and judges are not the most zen-like creatures. A little zen mind will do them no harm.

151. See, for example, the following comment about *Lucas* in a recent student note in the *Harvard Law Review*:

Had the South Carolina Coastal Council taxed Mr. Lucas for the damage he was doing to the environment, and assessed that damage at an amount that made it fiscally impossible for him to build a home there, the Council might have achieved the same results that it attempted to achieve with a regulatory ban. *Yet as a tax, the Council's policy would not be subject to scrutiny under the Takings Clause.*

Note, *The Principle of Equality in Takings Clause Jurisprudence*, 109 HARV. L. REV. 1030, 1038 (1996) (emphasis added).

